

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

VENEGAS CONSTRUCTION CORPORATION¹
Employer

and

Case No. 26-RC-8251
(formerly 24-RC-8170)²

UNION DE CARPINTEROS DE PUERTO RICO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:³

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Venegas Construction Corporation, hereinafter referred to as the Employer, is a Puerto Rico corporation with an office and place of business located in Ponce, Puerto Rico, where it is engaged in the construction industry. During the past 12 months, a representative period, the Employer had gross

¹ The Employer's name appears as amended at the hearing.

² The General Counsel issued an Order Transferring Case from Region 24 to Region 26. Pursuant to said Order, to the extent that further proceedings are appropriate to effectuate this Decision, this case will automatically transfer back to Region 24 and will continue as Case 24-RC-8170, except that Region 26 will retain jurisdiction only with respect to pre-election issues relating to the substance of this Decision.

³ The Employer and the Petitioner filed timely briefs, which have been duly considered.

revenues in excess of \$500,000 and purchased goods and materials valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico. Accordingly, I find the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, who I find to be a labor organization within the meaning of Section 2(5) of the Act, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent all carpenters, carpenter helpers, rodmen, rodman helpers and laborers employed by the Employer at its chemistry and biology building projects at the University of Puerto Rico, Mayaguez. The Employer asserts the appropriate unit is all carpenters, laborers and rodman employed by the Employer at the biology and business administration building projects at the University of Puerto Rico, Mayaguez. Alternatively, the Employer asserts the petition should be dismissed as untimely under the expanding unit principle.

The Employer is a construction company located in Ponce, Puerto Rico. Its president is Emilio Venegas. The Employer employs three types of employees: carpenters, laborers⁴ and rodmen.

The Employer is in the process of constructing a biology building⁵ on the campus of the University of Puerto Rico, Mayaguez. The project engineer at the biology building

⁴ The Employer does not employ carpenter helpers or rodman helpers; rather, all unskilled employees are classified as laborers.

⁵ Venegas testified the Employer is not now nor will it be constructing a chemistry building. The Petitioner presented no evidence to show otherwise.

project is Heriberto Maya. The construction of the biology building is a \$21 million project with 160,000 square feet. Construction commenced in 2000 and is scheduled to take 3 years. Currently, the project is approximately 35 to 40 percent complete. The Employer's current workforce includes 40 laborers, 20 carpenters and one rodman. Venegas testified the Employer would employ 35 carpenters and 65 to 70 laborers at peak construction of the biology building, which Venegas testified, would be in July 2001.

The record evidence demonstrated that on February 12, 2001, the Bidding Board for Permanent Improvements of the University of Puerto Rico, Mayaguez campus awarded the Employer the construction of a business administration building at the Mayaguez campus. The Employer provided further documentation dated February 23, 2001, from the University of Puerto Rico, Mayaguez establishing that its winning bid was \$17,117,000 for construction of the business administration building. Venegas testified the Employer has signed a contract with the University but the University has not returned the executed copy to the Employer. Venegas stated the Employer is awaiting the Notice to Proceed, which will give the exact starting date for the new construction contract. Venegas testified he anticipated receiving the Notice to Proceed by mid-April 2001⁶ and that the project would begin 10 days after receipt of said Notice. Venegas stated he has reached agreement with major sub-contractors for the business administration building but has not purchased any materials for the project, been paid any money by the University, nor hired any employees.

Venegas testified the construction of the business administration building would last approximately 30 months. The business administration building will be 140,000 square feet and be located approximately ½ mile from the biology building. Venegas testified the Employer expected to employ a total of 30 carpenters, 55 to 60 laborers and 0 rodmen at the business administration project. According to Venegas, at the end of 2001, the Employer will employ about 50% of the total needed carpenters and laborers for construction of both buildings, biology and business administration.

Venegas testified construction of the business administration building would be the same when compared with duties and tasks of the employees currently employed on the biology building project. Furthermore, Venegas stated Maya would be the project manager for both buildings, the supervisors will be the same with some additional supervisors hired and employees will be moved between the two building sites.

As previously stated, the Employer asserts the only appropriate bargaining unit consists of carpenters, laborers and rodman employed at the Employer's biology building project as well as those carpenters and laborers who will be employed at the Employer's business administration building project. Alternatively, the Employer asserts the petition is untimely and should be dismissed.

With regard to its first position, the Employer asserts a single unit comprised of employees from both buildings is appropriate because all carpenters, laborers and the rodman will share a community of interest. In determining an appropriate unit, the Board applies a community of interest analysis, wherein a number of factors are

⁶ As of April 10, 2001, the date of the Employer's brief, the Notice to Proceed had not been received by the Employer since the Employer had reserved an exhibit number for the contract to be attached to the

considered, including the similarity of duties, job qualifications, wages, benefits and working conditions, extent of interaction and interchange, organizational structure, functional integration of the business, history of collective bargaining and the scope of the petitioned-for unit. **Kalamazoo Paper Box Corp.**, 136 NLRB 134 (1962).

In its brief, the Employer states:

The evidence however showed, under Venegas' testimony, that all the elements of a community of interests are present between and for the employees of both projects. In first instance, both groups of employees are to execute the same functions, a fraction of them as carpenters and the other fraction as laborers, and there is going to be interchange of personnel between one project and the other. Secondly, all the employees are going to share the same supervision, in that foremen are going to be working on both sites, and the management or overall supervision is going to be in engineer Heriberto Maya's hands. These employees are going to perform the same tasks at the same site, the RUM's campus, and just half a mile apart from each project. Both groups of employees are entitled to the same terms and conditions of employment.

Contrary to the Employer's assertions, the record evidence is inconclusive concerning whether the Employer's employees at the biology building project will have a community of interest with its employees at the business administration building project. I base this upon the fact that the Employer does not currently have any employees working on the business administration building project. Apparently, the Employer will soon commence work at the business administration building project, where it will employ carpenters and laborers. However, despite Venegas' testimony it is speculative that employees hired for the business administration building project will have a community of interest with the Employer's carpenters, laborers and rodman at the biology building project. The Employer failed to provide any caselaw in support of its position that the unit should consist of current employees and those hired on the future construction project. Accordingly, I find the inclusion of future employees at the

Employer's brief if received by then.

business administration building project to be inappropriate. Rather, I find an appropriate unit to be the carpenters, laborers and the rodman employed by the Employer at its biology building project at the University of Puerto Rico, Mayaguez.

The Employer's second assertion is the petition is untimely under the expanding unit principle. The Board set forth the test for an expanding unit in **Endicott Johnson de Puerto Rico**, 172 NLRB 1676 (1965), wherein it held the appropriate consideration is whether the present employee complement is substantial and representative. In **Toto Industries (Atlanta)**, 323 NLRB 645 (1997), the Board explained its reasoning as follows:

The expanding unit principle has two objectives, both premised on employees' rights to select a bargaining representative, if they so desire, and to ensure employee participation therein. Therefore, current employees should not be deprived of the right to select or reject a bargaining representative simply because the employer plans an expansion in the near future. The Board, however, does not desire to impose a bargaining representative on a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals. To determine this issue, the Board adopted its "substantial and representative" test. In determining whether an employee complement is "substantial and representative" so as to warrant holding an immediate election, the Board has avoided any hard and fast rules. Instead a case-by-case approach is utilized, analyzing the relevant factors of each case. Factors used to determine whether the employee complement is sufficiently substantial and representative to order an immediate election in an expanding unit include: (1) the size of the present workforce at the time of the representation hearing; (2) the size of the employee complement who are eligible to vote; (3) the size of the expected ultimate employee complement; (4) the time expected to elapse before a full workforce is present; (5) the rate of expansion, including the timing and size of projected interim hiring increases prior to reaching a full complement; (6) the certainty of the expansion; (7) the number of job classifications requiring different skills which are currently filled; (8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and (9) the nature of the industry.

In **Clement-Blythe**, 182 NLRB 502 (1970), the Board stated Congress recognized the need for permitting collective bargaining to begin as early as possible in

the construction industry in order to accommodate the fluctuating and unpredictable duration of construction activities. Thus the Board stated, "We give more emphasis in the construction industry to the desirability of an early choice given to the employees than to postpone an election in order to achieve a full employee complement." *Id.* at 503.

In the case *sub judice*, there were 61 unit employees in the workforce at the time of the representation hearing. The Employer estimated its peak workforce at the biology building and business administration building would be approximately 100 to 105 and 85 to 90 employees, respectively. Thus, the current workforce is approximately 31 to 33 percent of the total projected workforce. The Employer did not state when it would reach this peak but stated over 50% of its workforce would be employed by the end of 2001. As it expands its workforce, the Employer will not be expanding its job classifications; rather, it will continue to have three job classifications, carpenters, laborers and rodman. While it appears quite certain that the Employer will continue to hire more employees, the rate of expansion is not provided in the record evidence. Furthermore, the record evidence does not provide a date certain that the business administration building project will commence.

In similar factual situations, the Board has found a substantial and representative complement. Recently, in **Yellowstone International Mailing**, 332 NLRB No. 35 (2000), the Board found a substantial and representative complement where the employer employed 38% of its projected peak workforce and no new job categories would be created. In **Clement-Blythe**, *supra* at 503, the Board determined the employer, a construction contractor, employed a substantial and representative

complement when it had 43 employees at the time of the scheduled election, would be expanding to approximately 140 employees over the next six months and had filled over 50% of its job classifications. Similarly, the Board in **Bell Aerospace Co., a Division of Textron, Inc.**, 190 NLRB 509 (1971), found a substantial and representative complement of employees, where the employer employed 76 employees in over half of the unit job classifications and projected to hire an additional 172 employees over the next three months. Moreover, in **Endicott Johnson de Puerto Rico**, *supra*, at 1676-77, the Board also found a substantial and representative complement of employees where the employer, a shoe manufacturer, had 200 employees working in 115 job classifications in April 1968 and definitely expected to expand to over 500 employees in 250 job classifications by the end of 1968. Finally, in **NLRB v. Asbury Graphite Mills, Inc.**, 832 F. 2d 40, 43 (3d Cir. 1987), the Court upheld the Board's decision to conduct an immediate election where, at the time of the election, the employer employed one-third of the expected full complement, the employer did not expect to reach full complement for another nine months and the work performed by the existing employees was representative of future operations. In these five cases, the employers had between 31% and 40% of its projected workforce in place at the time of the representation hearing, had approximately 50% to 100% of its job classifications filled at that time and the current workforce was performing the same type of work as the projected new employees would perform.

The Employer's citation to **Fall River Dyeing & Finishing Corp. v. NLRB**, 482 U.S. 27 (1987), is inapposite to the case at bar because it involves finding when the "substantial and representative complement" has been hired in order to determine the

appropriate date that a bargaining obligation commences as opposed to when an election may be held. As the Court recognized at footnote 18 in its **Fall River** decision, there is a distinction in application of the rule to the two situations.

Based upon the above analysis, I find the Employer's workforce is a substantial and representative complement because the Employer, a construction employer, currently employs approximately 31% to 33% of its expected total workforce and the workforce is employed in all job classifications.

Accordingly, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining unit within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time carpenters, laborers and rodman employed by the Employer at the biology building project at the University of Puerto Rico, Mayaguez.

Excluded: All other employees, including office clerical employees, guards and supervisors as defined in the Act.

There are approximately 61 employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did

not work during that period because they were ill, on vacation, or temporarily laid off.⁷ Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Union de Carpinteros de Puerto Rico.

ELECTION NOTICES

Your attention is directed to Section 102.30 of the Board's Rules and Regulations, which provides that the Employer must the Board's official Notice of Election at least three (3) full working days before the day of the election, excluding Saturdays, Sundays, and holidays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v.*

⁷ The parties agreed not to use the eligibility formula for construction employees as set forth in **Steiny & Co.**, 308 NLRB 1323 (1992) and **Daniel Construction Co.**, 133 NLRB 264 (1961).

Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 24 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, Hato Rey, Puerto Rico on or before April 23, 2001. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by April 30, 2001.

DATED at Memphis, Tennessee, this 16th day of April, 2001.

/s/

Thomas H. Smith, Acting Director, Region 26
National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627

Classification Index

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